UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICKY MITCHELL ANDERSON,

Petitioner,

v.

R. HICKMAN,

Respondent.

_____/

No. C 99-4125 MHP

**MEMORANDUM & ORDER**
**Petition for Writ of Habeas Corpus**

Petitioner Ricky Mitchell Anderson is an inmate of Mule Creek State Prison in Ione, California, following his conviction for second-degree murder. On September 7, 1999, Anderson filed the instant petition for a writ of habeas corpus, his second in this court, challenging his conviction on the following grounds: 1) improper peremptory challenges by the prosecution in violation of his right to equal protection; 2) judicial misconduct; 3) ineffective assistance of counsel; 4) denial of severance from co-defendant resulting in the violation of his right to a fair trial and denial of due process; 5) prevention of cross-examination of a prosecution witness in violation of his right to confrontation; and 6) denial of a competency hearing. After appeal to the Ninth Circuit and remand, Anderson's second federal habeas petition is again before this court. Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

On August 1, 1990, Anderson and his co-defendant, Jesse Morales, were charged with the murder of Benjamin Romero. See Cal. Pen. Code § 187. Both defendants pleaded not guilty. The Contra Costa District Attorney also charged Anderson under Penal Code section 12022(b) with the enhancement of personal use of a deadly and dangerous weapon and alleged that Anderson had a prior serious felony conviction. The defendants were tried together. In January 1991, a jury found Anderson guilty of second-degree murder and found both the dangerous weapon and prior serious felony allegations against him to be true. The jury convicted Morales of manslaughter. In March 1991, the trial court sentenced Anderson to state prison for 21 years: 15 to life for the murder, plus one additional year for the deadly weapon enhancement and five years for the prior serious felony enhancement.

I. Direct Review

Anderson appealed his conviction to the California Court of Appeal on April 14, 1991. In his direct appeal, Anderson made three claims: 1) that the prosecution violated Anderson's federal and state constitutional rights to equal protection by using peremptory challenges to exclude African-American and Hispanic jurors; 2) that the trial court erred by failing to sever Anderson's trial from that of his co-defendant; and 3) that the trial court's ruling preventing impeachment of Thomas Hunt violated Anderson's constitutional right to a fair trial. The Court of Appeal considered all three issues and upheld the sentence on December 9, 1992. People v. Anderson, No. A053247 (Cal. App. Dec. 9, 1992). On January 12, 1993, Anderson submitted a petition for review to the California Supreme Court, focusing solely on the issue of the racially-biased peremptory challenges. The California Supreme Court denied the appeal without further opinion on March 10, 1993. People v. Anderson, No. S030700 (Cal.Mar. 10, 1993)(mem.)

II. Habeas Review A.

State Habeas Petition

On July 20, 1994, Anderson filed a pro se habeas petition in California Superior Court, alleging 1) ineffective assistance of counsel; 2) judicial bias and misconduct premised upon comments made by the trial judge; and 3) failure of the trial court to hold a hearing regarding Anderson's competency to stand trial.[1]

On July 28, 1994, the California Superior Court denied Anderson's petition on the grounds that: 1) Anderson had failed to establish an adequate factual record to support his claims of ineffective assistance of counsel; 2) the single potentially prejudicial comment made by the trial judge was insufficient to support the claim that she had committed prejudicial error; and 3) Anderson failed to establish that he was taking any psychotropic drugs at the time of his trial. People v. Anderson, No. 941301 (Cal. Super. Ct. July 28, 1994). Anderson subsequently submitted a "Motion to Amend to [sic] Writ of Habeas Corpus" in California Superior Court. By this motion, Anderson sought to amend his habeas petition to clarify that he was claiming ineffective assistance of counsel for failure to request a competency hearing; he also sought to add evidence that he was taking psychotropic drugs at the time of his trial. The California Superior Court denied the motion because the exhibit supporting the psychotropic drug claim was not authenticated, legible, or useful in establishing Anderson's contention. See Order re: Motion to Reconsider Writ of Habeas Corpus, People v. Anderson, No. 941301 (Cal. Super. Ct. Aug. 24, 1994).

On September 12, 1994, Anderson filed a pro se habeas petition in the California Court of Appeal on the same grounds. The California Court of Appeal denied the petition without opinion on September 15, 1994. On October 11, 1994, Anderson filed a petition for review in the California Supreme Court, resubmitting the petition forms from the July 20, 1993, Superior Court habeas proceeding. The California Supreme Court denied the petition for review on the merits on November 16, 1994. In re Anderson, No. S042617 (Cal. Nov. 16, 1994).

B. Federal Habeas Petitions

Anderson filed a petition for writ of habeas corpus in this court on December 13, 1994, stating six grounds for relief: 1) improper peremptory challenges by the prosecution; 2) failure of the court to grant severance from his co-defendant; 3) prevention of impeachment of prosecution witness; 4) ineffective assistance of counsel; 5) denial of competency hearing; and 6) bias of the trial judge. Anderson v. California, No. C 94-4267 MHP (Dec. 13, 1994). After a long delay in receiving clarification from Anderson regarding exhaustion of his claims and an administrative mixup in which Anderson filed a new petition rather than amending his then-current petition, the court dismissed Anderson's petition on April 2,

1999, for failure to exhaust two claims pursuant to Rose v. Lundy, 455 U.S. 509, 510 (1982). Those unexhausted claims were: 1) the trial court's failure to grant a motion to sever from Anderson's co-defendant, and 2) the trial court's exclusion of evidence regarding Thomas Hunt's subsequent arrest for assault in an unrelated event three months after Romero's murder.

After the dismissal of his first federal habeas attempt, Anderson filed a second habeas petition with the California Supreme Court on April 28, 1999. Anderson based the second California Supreme Court habeas petition on the trial court's failure to sever and Hunt's cross-examination. The California Supreme Court denied the petition, citing In re Waltreus, 62 Cal. 2d 218, 225 (1965). In re Anderson, No. S078508 (Cal. July 28, 1999).

Anderson then filed a second federal habeas petition with this court on September 7, 1999,[2] on six grounds: 1) improper peremptory challenges by prosecution in violation of his right to equal protection; 2) judicial bias and misconduct; 3) ineffective assistance of counsel; 4) failure to sever trial from co-defendant resulting in the violation of his right to a fair trial and denial of due process; 5) prevention of cross-examination of a prosecution witness in violation of his right to confrontation; and 6) denial of a competency hearing. The court granted the state's motion to dismiss the second federal habeas petition on the grounds that it was time-barred under AEDPA. The dismissal was reversed and remanded by the Ninth Circuit in light of Ford v. Hubbard, 330 F.3d 1086 (2002). Anderson v. Hickman, 52 Fed. Appx. 62, 2002 U.S. App. LEXIS 25148, *2-3 (9th Cir. 2002). The Ninth Circuit held that the court erred when it failed to inform Anderson at the time it dismissed his first federal habeas petition that he had to choose between returning to state court to exhaust his claims (thereby forgoing the tolling of the AEDPA statute of limitations) or refiling the petition with only the exhausted claims (thereby waiving the unexhausted claims). Id.; see also Ford, 330 F.3d at 1102.

DISCUSSION

I. Procedural Issues

A. Exhaustion

The main purpose of exhaustion is to protect principles of comity between state and federal courts. Greene v. Lambert, 288 F.3d 1081, 1088 (9th Cir. 2002). State courts must be given the opportunity to

address a petitioner's federal claims. See, e.g., id. A habeas petition should be dismissed if the claims contained within the petition have not been fairly presented to the state's courts in a manner allowing those courts to review the merits of those claims. O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254(b)(1).

Anderson presented the peremptory challenge claim on direct appeal to the California Supreme Court.[3] He then presented the ineffective assistance of counsel, judicial misconduct, and competency hearing claims in his first state habeas petition to the California Supreme Court. Finally, he presented claims regarding the failure to sever and the exclusion of Hunt's testimony in his second habeas petition to the California Supreme Court. Thus, all of Anderson's claims have been presented to the California Supreme Court either on direct appeal or by habeas petition, and all avenues of state review on Anderson's current claims have been exhausted. Greene, 288 F.3d at 1088.

B. Procedural Default

Under the independent and adequate state grounds doctrine, federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991). This rule applies to state law decisions that rest on procedural grounds as well as to those that rest on substantive grounds. Henry v. Mississippi, 379 U.S. 443, 446 (1965). "Thus, the independent [and adequate] state grounds doctrine bars the federal courts from reconsidering the issue in the context of habeas corpus review as long as the state court explicitly invokes a state procedural bar rule as a separate basis for its decision." McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995) (citing Harris v. Reed, 489 U.S. 255, 264 n.10 (1989)).

The California Supreme Court denied Anderson's first habeas petition without issuing an opinion. This "postcard" denial of a habeas claim by a state supreme court constitutes a decision on the merits. Lewis v. Borg, 879 F.2d 697, 698 (9th Cir. 1989). The California Supreme Court denied Anderson's second habeas petition with a citation to In re Waltreus, 62 Cal. 2d 218, 225 (1965), a case holding that claims not raised on direct review cannot generally be relitigated on habeas. The State now argues that this

is a procedural bar to Anderson's claims on federal habeas review. However, reliance on In re Waltreus does not bar federal court review because the Supreme Court has determined that such a denial is neither procedural nor on the merits. Hill v. Roe, 321 F.3d 787, 789 (9th Cir. 2002) ("In Ylst v. Nunnemaker, 501 U.S. 797 (1991), the United States Supreme Court held that an In re Waltreus citation . . . has no bearing on a California prisoner's ability to raise a federal constitutional claim in federal court . . . [and does] not bar federal court review."). Because the other California decisions in this matter were either on the merits or "postcard" opinions, this court finds no procedural default that would bar review on the merits of any of Anderson's claims.

II. Substantive Claims[4]

A petition for habeas corpus from a state court conviction is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. section 2254.[5] Section 2254 sets a deferential standard of review of "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). When reviewing habeas petitions, federal courts defer to the state court's determination of federal issues unless a determination is "contrary to, or involved an unreasonable application of, clearly established Federal law," Himes v. Thompson, 336 F.3d 848, 852 (9th Cir. 2003), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(1), (2).

A state court's decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a [different] result . . . ." Mitchell v. Esparza, 124 S. Ct. 7, 10 (2003) (citing Williams v. Taylor, 529 U.S. 362, 405-406 (2000)). A state court's decision involves an "unreasonable application of" Supreme Court authority if it correctly identifies the governing rule but unreasonably applies it to a new set of facts. Id. Under AEDPA, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable." Sanders v.

Lamarque, 357 F.3d 943, 2004 U.S. App. LEXIS 1541, *12-13 (9th Cir. 2004) (citing Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003)). A state court need not cite or even be aware of Supreme Court precedents, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Mitchell, 124 S. Ct. at 10 (citing Early v. Packer, 537 U.S. 3, 7 (2002) (per curiam)).

Under AEDPA, the state court's factual findings are entitled to a presumption of correctness so the petitioner must prove factual findings erroneous by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); see also Zichko v. Idaho, 247 F.3d 1015, 1019 (9th Cir. 2001). When a state court does not find a constitutional violation, a federal court may grant relief if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

A. Claim One: Discriminatory Use of Peremptory Challenges

Anderson and his co-defendant, Morales, are Hispanic men. Anderson argues that his right to equal protection was violated by the prosecutor's use of peremptory challenges to strike four jurors: Bertha Crane, Deborah Hughes, Frank Serta, and Ceila Lopez. Crane and Hughes are African-American; Serta and Lopez are Hispanic. Anderson claims that all four strikes were improper peremptory challenges.[6]

1. Legal Standard

The Equal Protection Clause forbids all parties in both criminal and civil trials from challenging prospective jurors solely on account of their race. Georgia v. McCollum, 505 U.S. 42, 58-59 (1992); Batson v. Kentucky, 476 U.S. 79, 89 (1986). Peremptory challenges based solely on race are prohibited even if the defendant and juror are of different races. United States v. Vasquez-Lopez, 22 F.3d 900, 901 (9th Cir. 1994) (citing Powers v. Ohio, 499 U.S. 400, 402 (1991)).

Batson sets forth a three-step procedure for considering inappropriate race-based challenges. First, a defendant must make a prima facie showing that a peremptory challenge was exercised on the basis of race. Second, if the defendant succeeds in making a prima facie showing, the prosecution must offer a race-neutral basis for striking the juror in question. Third, the trial court must determine whether the defendant has shown purposeful discrimination. Miller-El v. Cockrell, 537 U.S. 322, 328-329 (2003). "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court

has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." Hernandez v. New York, 500 U.S. 352, 359 (1991).[7] Therefore, the court need only analyze the race-neutral basis and purposeful discrimination prongs of the Batson test with respect to the challenged jurors.

At the second Batson step, "[w]hether the justification offered by a prosecutor is an adequate race-neutral explanation is a question of law," United States v. Bishop, 959 F.2d 820, 821 n.1 (9th Cir. 1992). Thus, a state court's findings will only be overturned if the decision was "contrary to" or involved an "unreasonable application of" federal law. 28 U.S.C. § 2254(d). "[A]ny explanation based on something other than race will constitute a race neutral reason unless discriminatory intent is inherent in that explanation." Williams v. Rhoades, 354 F.3d 1101, 1107 (9th Cir. 2004).

At the third Batson step, the trial court should ideally employ "most, if not all" of "the various tools at its disposal . . . to fulfill its duty to determine whether purposeful discrimination has occurred."[8] Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir. 2003). Lewis permits a reviewing court to assess a third-prong Batson question using both the trial court's findings and evidence on the record to evaluate the prosecutor's reasons and credibility, and to compare the struck and empaneled jurors. Id. at 832. However, for purposes of assessment under AEDPA, these steps are not strictly required so long as courts fulfill their duty to determine whether the defendant has established purposeful discrimination. Id. ("A court faced with a Batson challenge need not follow every detail of the ideal, step-three analysis in order to conduct a constitutionally permissible analysis."). A state court's determination that there was no discriminatory purpose behind the prosecutor's strikes is a factual finding entitled to deference under AEDPA. Miller-el, 537 U.S. at 347 ("To secure habeas relief, petitioner must demonstrate that a state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court."). An unreasonable application of federal law also occurs when the trial and reviewing state courts entirely fail to fulfill their affirmative duty to determine whether purposeful discrimination has occurred. Lewis, 321 F.3d at 835.

2. Analysis

According to the record before this court, the prosecutor used peremptory challenges to remove at least eleven jurors. Of those jurors removed, two were African-American and two were Hispanic. The prosecution used its first two peremptory challenges to strike white jurors. It used its next peremptory to strike Crane, the only African-American juror then on the venire panel. The prosecution then used two more peremptories against members of an all-white, non-Hispanic panel. An Hispanic juror, Serta, entered the venire, and the prosecution struck two more white jurors. Then a second African-American juror, Hughes, joined the venire. The prosecution's next two peremptories were used to strike the Hispanic and African-American jurors, Serta and Hughes.[9] Anderson then made his first of two motions for a mistrial pursuant to People v. Wheeler, 22 Cal. 3d 258 (1978),[10] alleging that the prosecutor had improperly dismissed the three jurors on the basis of race.[11] The trial judge did not find a prima facie case for discriminatory use of the peremptory challenges, but still required the prosecutor to explain his reasons for striking Crane, Hughes, and Serta. After hearing the prosecutor's explanations, the trial judge stated, "[H]ad I made [a prima facie] finding, the reasons outlined here . . . [were] more than sufficient" to explain the prosecution's challenges. Exh. A-3 at 161. The court thus denied Anderson's Wheeler motion.

The trial court's ruling with regard to the first three challenges (of Crane, Hughes, and Serta) does not provide an appropriate basis for habeas relief. Regarding Crane, the prosecutor articulated a single reason for striking her: that she seemed reluctant to view the bloody photos that would be important to his case. This racially-neutral explanation is supported by the record. Before counsel began individual questioning, Crane asked whether she would have to view bloody photographs as part of her responsibilities as a juror. During the prosecutor's voir dire, she again expressed discomfort at the prospect of having to view photographs of the murder victim because the sight of blood upset her. Exh. A-3 at 113-14. Anderson argues that this reason was pretextual, citing as support Turner v. Marshall, 121 F.3d 1248, 1251-52 (9th Cir. 1997), in which the court determined the prosecutor had a racially-discriminatory motive where an African-American juror was struck for expressing disinclination to view gory photos while a white juror was retained for expressing the same disinclination more vehemently. In that case, no other facts supported the prosecutor's challenge to an otherwise unobjectionable juror. Here, as the state Court of Appeals noted in denying Anderson's Equal Protection claim on direct appeal, Crane

had also stated that she had a grandson who was in jail in Stockton on breaking and entering charges. Exh. A-3 at 113-14. The trial and state courts' determinations were not unreasonable based on either the state courts' application of federal law or the facts on the record.

Regarding Hughes, the prosecutor explained that he used a peremptory challenge because Hughes had relatives in jail and, because of that, might unduly sympathize with the defendants. Like the challenge to Crane, this explanation is supported by the record. During voir dire, Hughes, the second African-American woman in the venire to be challenged by the prosecutor, stated that she had three brothers who had been in custody, one of whom was still in jail. Although she did not know what the charges were and stated that she was not close to her family, the determination by the state courts that her exclusion was not racially-motivated was not an unreasonable one. See, e.g., People v. Allen, 212 Cal. App. 3d 306, 312 (Cal. App. 1989) ("[S]pecific bias may be properly inferred from the juror's prior arrest or conviction, or his complaint of police harassment. Likewise, a prior arrest or conviction of the juror's relative, etc. may furnish a basis for such an inference.").

Regarding the challenge to Serta, an Hispanic man and the third challenged juror of color, the prosecutor gave the following explanation: 1) Serta had responded that he did not feel he would be the best juror on the case; 2) he had a nephew who was involved in drug dealing; 3) he had previously been struck by a district attorney from a separate venire; 4) he felt the questions on voir dire were demeaning; 5) he had lived in the barrio, was familiar with rough neighborhoods, and held himself to be an expert in that sort of environment; and 6) his brother's friend had been killed in an altercation and Serta did not feel good about how the case had been handled. Although the prosecutor's reasons are supported by the record,[12] analysis on the third Batson prong of the prosecutor's fifth reason for striking Serta, that he had lived in the barrio and was familiar with rough neighborhoods, gives this court greater pause because the Ninth Circuit has established that "neighborhood" can be considered a proxy for race when assessing Batson challenges. Bishop, 959 F.2d at 823, 825.

"[A] reason is not race-neutral if there is no nexus between the jurors' characteristic . . . and their possible approach to a specific trial. In other words, a generic reason or group-based presumption applicable in all criminal trials to members of a minority is not race-neutral." Stubbs v. Gomez, 189 F.3d

1099, 1106 (1999) (citing Bishop, 959 F.2d at 823, 825) (citations omitted). Serta himself predicted that he would be struck by the prosecutor. He stated, "[W]henever there is a Hispanic or Mexican-American defendant . . . I'm usually bumped off the jury by the prosecution." Exh. A-3 at 321. Asked by the prosecutor whether he could be impartial, Serta first stated he would be able to be fair, but, upon further questioning, he stated that he thought that this was the sort of case he would prefer not to sit on. Id. at 327-28. During voir dire, Serta stated, "As a younger person . . . [I] spent a lot of time in the San Diego area and the barrios . . . . So I'm very familiar with those environments and how to survive in those places." When questioned as to whether he might rely on this supposed expertise during jury deliberations, Serta responded, "I think that would be a valid concern." Exh. A-3 at 326. Reviewing the voir dire transcript and considering that the incident in question had taken place in a low-income apartment complex in Antioch, the state court could have reasonably decided that the prosecutor's statement was not a generalization about people who have lived in predominantly Hispanic neighborhoods, but a concern that Serta, in particular, had claimed an expertise in such neighborhoods. The prosecutor's explanation displayed a nexus between the juror's specific experience and his particular approach to the trial. Hence, all of the prosecutor's reasons for striking Serta were sufficiently race-neutral to satisfy the second Batson prong. In light of the remaining reasons the prosecutor articulated for challenging Serta, this court likewise concludes that the state court determinations on the third Batson prong were not clearly erroneous.

After the state court resolved Anderson's first Wheeler motion, the prosecution continued to use its peremptory challenges, striking a ninth white juror from a panel with no African-American or Hispanic jurors. A second Hispanic juror, Lopez, entered the venire and, after striking a white juror, the prosecutor used his eleventh peremptory to strike that second Hispanic juror.[13] Anderson then made a second Wheeler motion. This time, the judge found the defendants had made a prima facie showing of group bias and again required the prosecutor to articulate his reasons for the challenge. The prosecution articulated three reasons for striking Lopez: 1) Two weeks prior, Lopez had been stricken by the defense in another case, and the prosecutor thought she might take pains to please the defense in this case; 2) Lopez had been a plaintiff in a civil case and might have a misconception regarding the standard of proof; and 3) Lopez's current studies to become a paralegal may cause her to interject her own feelings about the law. The trial

court found the first two reasons to be insufficient but found that the paralegal training was a legitimate reason for exercising a peremptory challenge and denied the Wheeler motion. The Court of Appeals affirmed the denial, stating that California case law recognizes legal training as a valid race-neutral basis for a Wheeler challenge. Anderson, No. A053247 at 9 (citing People v. Barber, 200 Cal. App. 3d 378, 389 (Cal. App. 1988) and People v. Chambie, 189 Cal. App. 3d 149, 156 (Cal. App. 1989)). Anderson argues that the court's rejection of two of the prosecutor's three reasons for challenging Lopez *per se* requires the court to find that the third reason was pretextual. This is not so. In determining whether the defendant has carried his burden on the third Batson prong, the Supreme Court provides that "a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Batson, 476 U.S. at 93 (internal quotation marks omitted). The judge must weigh all factors in making her determination and the factual record does not support the conclusion that the state court made an unreasonable determination of facts in this matter. The decision to strike Lopez was supported by a valid race-neutral reason, and there is no evidence of discriminatory purpose.

Finally, this court does not find that the state courts entirely failed to fulfill their duty to determine whether purposeful discrimination occurred under the third Batson prong. There is no indication that the trial judge misunderstood her role. In response to the first Wheeler motion, the court found that the reasons articulated by the prosecutor would have been sufficient even had she found the defendants had made out a prima facie case of racial motivation. Although she did not give the defendants a chance to voice their interpretation of the record, Lewis acknowledges that there is no clearly established requirement to allow such argument. Id. at 831 ("[R]equiring a court to allow defense counsel to argue is not clearly established law."). With respect to the second Wheeler motion, the trial court found a prima facie case for discrimination, assessed the prosecutor's explanations, found two of them unconvincing, and denied the motion on the third ground. The record does not indicate further Wheeler motions by either co-defendant. The appellate court fulfilled its duty by reviewing the record and reaching a conclusion that there were sufficient and compelling race-neutral reasons to support a finding of no racial discrimination. The appellate court determined that three of the challenged jurors had relatives in custody and that this was a sufficient reason to support a finding of no racial discrimination. With regard to the fourth, the appellate court agreed

with the trial court that the prosecutor's first two reasons were insufficient but found the juror's legal training sufficient to overcome the presumption that the strike was racially-motivated. Neither the trial court's decision on the Wheeler motions nor the Court of Appeal's affirmance of that decision constitutes an unreasonable application of federal law. 28 U.S.C. § 2254(d). Furthermore, because the facts on the record support all determinations made by the trial and appellate courts, the state court decision is not based on an unreasonable determination of the facts.[14] Therefore, Anderson has not stated a valid Batson claim on which habeas relief may be granted.

B. Claim Two: Judicial Misconduct[15]

To succeed on a judicial bias claim, a petitioner must "overcome a presumption of honesty and integrity in those serving as adjudicators." Withrow v. Larkin, 421 U.S. 35, 47 (1975). A judge's remarks or opinions will not demonstrate bias unless they "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555 (1994). Furthermore, when a district court reviews a state court judge's behavior on habeas review, the question becomes "whether the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995).

Anderson's claim of judicial bias and misconduct depends entirely upon the following exchange, which occurred during Thomas Hunt's testimony:

> Prosecutor: Was this man, Mr. Anderson, the only man you saw hitting the victim with the baseball bat?
> Hunt: Well, I never did say really who had hit the man with the bat. I—all I was saying I saw the bat going up and down in the air, but to my knowledge, you know, because people were saying something about saying mentioning Ricky's name, you know, and I don't really—I ain't never known the man, but they say Ricky.
> Prosecutor: Don't tell us what other people said, but did you ever see anybody else with a baseball bat other than this man?
> Hunt: No, sir.
> Defense: I'm going to object. That misstates his testimony. He said he didn't know who was swinging the bat.
> Judge: Also, I feel your client, the person swing [sic] the bat—you can clarify on cross.

Exh. A-6 at 707-08. The judge's comment, even liberally construed as an expression of an opinion at all, was not an opinion regarding Anderson's guilt. At most, it was an imprecise response to the defense attorney's objections. Even if the comment could have be considered prejudicial, before the jury retired to

deliberate, the court specifically delivered the following instruction: "I have not intended by anything I have said or done or by any questions that I may have asked or by any ruling I may have made to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." Exh. A-13 at 2454, CALJIC No. 17.30. Such jury instructions are intended to cure imprecisions that slip into court proceedings, and juries are presumed to adhere jury instructions. See, e.g., United States v. Polizzi, 801 F.2d 1543, 1558 (9th Cir. 1986) (jury instructions held to cure prejudice flowing from prosecutor's comment to the jury); United States v. Yabrough, 852 F.2d 1522, 1540 (9th Cir. 1988) (strong presumption that jury instructions are followed and have curative effect).[16]

The state courts did not clearly err in finding Anderson's contention that the court committed prejudicial error was unsupported by the record. Thus, the California Court of Appeal's determination of this claim on habeas was not contrary to or an unreasonable application of federal law.

C. Claims Three and Six: Failure to Request or Receive a Mental Competency Hearing[17]

Anderson raises two separate claims with respect to the fact that he did not receive a mental competency hearing: 1) the trial judge failed, sua sponte, to order a mental competency hearing, and 2) he received ineffective assistance of counsel because his attorney failed to request a competency hearing regarding Anderson's fitness to stand trial.[18]

1. Legal Standards

a. Mental Competence

Competence is defined as the ability to understand the proceedings and to assist counsel in preparing a defense. Dusky v. United States, 362 U.S. 402, 402 (1960). When analyzing competence to stand trial, the court looks to whether a defendant has the ability to make a reasoned choice among the alternatives presented to him. Godinez v. Moran, 509 U.S. 389, 402 (1993). In making this determination, federal courts review the record to see if the evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence. Chavez v. United States, 656 F.2d 512, 516 (9th Cir. 1981) (citing Bassett v. McCarthy, 549 F.2d 616, 621 (9th Cir.1977)). On habeas review, "[t]he state trial and appellate courts' findings that

the evidence did not require a competency hearing . . . are findings of fact to which we must defer unless they are 'unreasonable' within the meaning of 28 U.S.C. § 2254 (d)(2)." Davis v. Woodford, 333 F.3d 982, 997 (9th Cir. 2003) (citing Torres v. Prunty, 223 F.3d 1103, 1105 (9th Cir. 2000)).

b. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, a petitioner must show that counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Fuller v. Roe, 182 F.3d 699, 703 (9th Cir. 1999). To justify habeas relief on the basis of ineffective assistance of counsel, Anderson must demonstrate that: 1) "counsel's representation fell below an objective standard of reasonableness;" and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).[19] A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. A defendant can make out a claim of ineffective assistance of counsel only by pointing to specific errors made by trial counsel. United States v. Cronic, 466 U.S. 648, 666 (1984). Counsel's conduct must be evaluated for purposes of the performance standard of Strickland "as of the time of counsel's conduct." Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994) (quoting Strickland, 466 U.S. at 690). Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. Strickland, 466 U.S. at 698.

2. Factual Support

Anderson claims that he was taking psychotropic drugs during his trial that affected his ability to stand trial. With his original habeas petition to the California Superior Court, Anderson produced evidence of previous psychological evaluations in connection with a 1988 arrest for arson and medical reports from his incarceration in 1990. The 1988 evaluations indicate that he was an angry person who had suffered abuse as a child; he also suffered headaches and hearing loss at the time of the reports. He further submitted pretrial detention facility reports from the period prior to his trial, indicating that he had been housed in the mental ward for aggressive behavior and had attempted suicide by tying a shirt around his neck. The Superior Court denied his original habeas application, stating that Anderson had failed to establish that he was prescribed or taking psychotropic drugs at the time of trial. With his motion to amend

his Superior Court habeas petition, Anderson submitted daily medication reports that indicated he was receiving doses of Elavil during his murder trial. The Superior Court denied Anderson's subsequent motion as a request to reconsider the habeas decision, determining that those additional submissions were unauthenticated, illegible, and failed to establish Anderson's claim of ineffective assistance of counsel.

3. Analysis

a. Ineffective Assistance of Counsel

The first prong of the Strickland analysis requires that Anderson demonstrate that counsel's performance was deficient. Defense counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. See Strickland, 466 U.S. at 691. However, a lawyer's failure to develop and relay medical evidence does not necessarily constitute ineffective assistance at the guilt phase. Wallace v. Stewart, 184 F.3d 1112, 1117 (9th Cir. 1999); Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1998) (concluding that "sentencing – where mitigation evidence may well be the key to avoiding the death penalty – is different"). This is because "[m]ental state is relevant at the guilt phase for issues such as competence to stand trial and legal insanity – technical questions where a defendant must show a specific and very substantial level of mental impairment. Most defendants won't have problems this severe, and counsel can't be expected to know that further investigation is necessary to develop these issues." Wallace, 184 F.3d at 1117 n.5 (citing Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995)).[20] Anderson was not facing the death penalty; therefore, counsel's obligation to further investigate Anderson's mental problems was reduced because of the high threshold for demonstrating mental incompetency. Even assuming that his trial counsel knew about Anderson's prescription for and failure to take medications, his suicide attempt, his brief stay in the mental patient module, and being "beaten up" by officers in jail, the failure to request a mental competency hearing would not necessarily indicate ineffective assistance of counsel if Anderson's attorney believed that requesting a mental competency hearing would have been futile. Medina v. California, 505 U.S. 437, 450 (1992) ("[D]efense counsel will often have the best-informed view of the defendant's ability to participate in his defense."); James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994) ("[F]ailure to make a futile motion does not constitute ineffective assistance of counsel."). On the record before the court, Andersons attorney might

have believed such a request would have been futile. Thus, Anderson's trial counsel did not necessarily perform deficiently.

The second prong of Strickland requires petitioner to show that counsel's errors were so serious as to deprive petitioner of a fair trial. See Strickland, 466 U.S. at 688. The petitioner bears the burden of demonstrating a due process violation premised on incompetency. Cacoperdo v. Demosthenes, 37 F.3d 504, 510 (9th Cir. 1994). To prove incompetency, a petitioner must demonstrate that he was unable to understand the nature of the proceedings and assist in his own defense. See Godinez, 509 U.S. at 396. In deciding a petitioner's claim of actual incompetence, federal courts may consider facts and evidence that were not available to the state trial court before and during trial. Williams v. Woodford, 306 F.3d 665, 705-06 (9th Cir. 2002). However, none of Anderson's proffered evidence indicates that Anderson was unable to understand the nature and consequences of the proceedings and to assist in his defense. Although he has adduced evidence that he was taking Elavil and possibly Thorazine at the time of trial, there is no indication that these drugs impaired him to the point of being incompetent to stand trial. A suicide attempt does not itself indicate incompetency to stand trial, nor does it trigger an obligation to conduct a competency hearing. Drope v. Missouri, 420 U.S. 162, 181 (1974). Anderson's suicide attempt before trial, while serious, does not necessarily indicate that he was incompetent to stand trial, particularly in light of the fact that he had stopped taking Elavil for depression prior to the attempt and, thereafter, his Elavil dosages resumed and were administered throughout the trial. Requiring Anderson to stand trial was not itself prejudicial. Therefore, Anderson fails on both Strickland prongs: He has not shown that his counsel's representation fell below an objective standard of reasonableness, nor has he established that, but for counsel's unprofessional errors, there was a reasonable probability that the jury would not have found him guilty. The state court's determination regarding Anderson's ineffective assistance of counsel claim was not contrary to, nor an unreasonable application of established Supreme Court law. 28 U.S.C. § 2254(d).

b. Court-Ordered Mental Competency Hearing"

Only when evidence raises a bona fide doubt about the defendant's competence to stand trial must a trial judge sua sponte conduct an evidentiary hearing." Davis, 333 F.3d at 997 (citing Pate v. Robinson, 383 U.S. 375, 385 (1966)) (quotation marks omitted). When reviewing whether a state court

should have sua sponte conducted a hearing, "a federal court may consider only the evidence that was before the trial judge." Williams, 306 F.3d at 702. Anderson's trial counsel did not bring Anderson's mental competency to the court's attention. Anderson has adduced no evidence, and the record reveals nothing, to suggest irrational behavior on the part of Anderson of which the trial judge was aware either before or during his trial that would indicate incompetency to the trial judge or trigger the court's sua sponte obligation to further investigate Anderson's mental state.[21] After trial the court received the probation officer's report. A review of that report, Exh. A-1 at 380-394, reveals that Anderson reported that he was on Elavil and "nervously" stated to the probation officer that he been "getting weird ideas of hanging [himself]." Id. at 394. Absent evidence that such a statement was made in earnest or that the defendant had taken action (which was not before the court), Anderson's statements to the probation officer, while relevant, were not of such magnitude that the court would have had a duty to conduct a mental competency hearing sua sponte. This court does not find that the state courts made an unreasonable determination based on the evidence; thus, Anderson's habeas claim that the trial court failed to conduct a sua sponte competency hearing in violation of his constitutional rights is unpersuasive. Davis, 333 F.3d at 997.

D. Claim Four: Denial of Severance[22]

Anderson first filed a motion for severance on August 23, 1990; this motion was denied on September 5, 1990, without oral argument. After being contacted by an investigator working for Morales' attorney, Anderson moved again for severance. The motion was argued and denied by the state trial court on November 27, 1990. After a ruling that Morales's statement, "I ain't saying nothing," was inculpatory only to Morales and would be inadmissible in the state's case in chief, Anderson moved again for severance. That motion was also denied.

Anderson claims he was deprived of his constitutional right to a fair trial because of the trial court's failure to sever his trial from that of his co-defendant. A court may grant habeas relief based on a state court's decision to deny a motion for severance only if the joint trial was so prejudicial that it denied a petitioner his right to a fair trial. Zafiro v. United States, 506 U.S. 534, 538-39 (1993) (holding that a court must decide if "there is a serious risk that a joint trial would compromise a specific trial right of one of

the defendants, or prevent the jury from making a reliable judgment about guilt or innocence"); United States v. Lane, 474 U.S. 438, 446 n.8 (1986) ("Improper joinder does not, in itself, violate the Constitution."). "The simultaneous trial of more than one offense must actually render petitioner's state trial fundamentally unfair and hence, violative of due process before relief . . . would be appropriate." Featherstone v. Estelle, 948 F.2d 1497, 1503 (9th Cir. 1991). Petitioner bears the burden of proving that the denial of severance rendered his trial fundamentally unfair. Grisby v. Blodgett, 130 F.3d 365, 370 (9th Cir. 1997); see also United States ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1956) ("[I]t is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.").

On habeas review, federal courts neither depend on the state law governing severance in state trials, Grisby, 130 F.3d at 370 (citing Hollins v. Dep't of Corrections, State of Iowa, 969 F.2d 606, 608 (8th Cir. 1992)), nor consider procedural rights to sever afforded in federal trials. Id. Rather, the relevant question is whether the state proceedings satisfied due process. To prevail on such a claim, Anderson bears the burden of demonstrating that the state court's denial of his motion to sever rendered his trial "fundamentally unfair." Id. To obtain relief based on denial of severance under federal law, a defendant must establish that prejudice arising from the failure to sever was so "clear, manifest, and undue" that he was denied a fair trial. Lambright v. Stewart, 191 F.3d 1181, 1185 (9th Cir. 1999).

Anderson has failed to make such a showing. First, Anderson alleges that an investigator working for Morales' attorney improperly questioned Anderson before trial. Morales' attorney denied authorizing the investigator to do so, and the prosecution did not obtain any information from this contact. The investigator's own declaration stated that Anderson had advised him of "some minimal information." Anderson did not then–and does not now–submit a declaration stating that he revealed inculpatory information to that investigator, nor has he adduced any other evidence that this improper contact rendered his trial unfair.

Second, Anderson claims that Morales's attorney was overheard by two jurors, Laird and Serrano (an alternate juror), in the courthouse coffee shop. The court conducted individual voir dires of these two

jurors to determine what the jurors overheard and to what extent they may have been influenced.[23] The court was satisfied that there were no grounds sufficient to warrant severance. In order to overcome the deference accorded the state courts, there must be clear evidence that the jurors relied on the comments of Morales' counsel overheard in the cafeteria in order for the court to come under a duty to grant a motion to sever or motion for mistrial. The court cannot assume that every inadvertent exposure of a juror to communications by parties or their counsel is grounds for a new trial. Because the court determined that the affected jurors did not overhear anything significant and admonished them to disregard anything they had overheard, the fairness of Anderson's trial was not impacted. Anderson "is entitled to a fair trial, but not a perfect one, for there are no perfect trials." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984).

Third, Anderson claims that trying the co-defendants together led to a prejudicial inference of Anderson's guilt by association. As the California Court of Appeals determined, it is unlikely that association with Morales made Anderson seem more guilty, given that Morales was convicted of a lesser offense. If anything, Morales would have seemed guiltier for associating with Anderson, who was convicted of the more serious crime. The disparate verdicts for the co-defendants demonstrate that the jurors were able to regard each co-defendant's charges as separate and distinct. See Featherstone, 948 F.2d at 1503-04 ("It is apparent from the jury's discerning verdict that it followed the court's instructions to regard each count as separate and distinct.").

Fourth, Anderson claims that his defense conflicted with Morales' defense. A defendant is entitled to a separate trial if "the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant." United States v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996). Anderson's defense was similar to Morales': that someone else struck the fatal blow to the victim. The victim received multiple blows from Anderson and others, and the autopsy report indicated that more than one blow could have caused his death. Because the jury could have found that both Morales and Anderson struck fatal blows, the defenses were not irreconcilable. See United States v. Cruz, 127 F.3d 791, 799-800 (9th Cir. 1997) (noting that

antagonistic defenses do not require severance, especially if the defenses are not irreconcilable), overruled on other grounds, United States v. Jimenez Recio, 537 U.S. 270 (2003).

Fifth, Anderson claims that Morales would have testified on his behalf had the defendants been tried separately. He claims that Morales would have testified that Anderson's actions were not voluntary, that Anderson was acting in self-defense, that Tito Quinones could have killed Romero, and that Quinones burned his clothes with Romero's blood on them. In order to prevail on such a claim, Anderson must produce clear evidence that Morales's testimony would have clearly exculpated him. See Grisby, 130 F.3d at 369 (finding that state trial court decision did not result in fundamentally unfair trial where "the testimony would not have clearly exculpated" the defendant). Anderson has produced no such evidence except statements by Anderson and his trial attorney's offer of proof. Yet, even if Morales would have testified to everything Anderson claimed, testimony regarding Anderson's intoxication, self-defense, and Quinones's involvement was presented during trial. Morales's testimony would have been cumulative rather than clearly exculpatory. For the foregoing reasons, Anderson's habeas claim fails because he has not demonstrated that the state unreasonably applied federal law in assessing the trial court's failure to sever.

E. Claim Five: Improper Exclusion of Evidence[24]

Anderson claims that the trial court's exclusion of evidence regarding Hunt's subsequent arrest for assault: 1) deprived him of his right to present his defense in violation of his right to due process; and 2) deprived him of his right to confront witnesses in violation of his Sixth Amendment rights. Washington v. Texas, 388 U.S. 14, 19 (1967).

1. Legal Standard

Evidentiary rulings are generally reviewed for abuse of discretion. United States v. Brooke, 4 F.3d 1480, 1487 (9th Cir. 1993). A state court's evidentiary ruling may be reviewed to determine whether it violated federal law, "either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." Walters

v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995) (citing Pulley v. Harris, 465 U.S. 37, 41 (1984)). However, the state court's ruling cannot be disturbed on due process grounds "unless the admission of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair." Id.

2. Factual Support

The record demonstrates that two defense witnesses reported that a "black man" struck the victim with a metal pole numerous times and continued to strike him after Anderson had stopped. A witness for the prosecution, Thomas Hunt, an African-American man, testified to having armed himself with a table leg, metal pipe, and butcher knife and to leaning over the victim after he had been knocked to the ground. During pretrial motions and at trial, Anderson sought the court's leave to question Hunt on a subsequent incident: three months after the night in question, Hunt was arrested for assault with a deadly weapon–a beer bottle, metal pipe, or metal baseball bat–but the charges were dropped.

The trial judge determined that Hunt's subsequent conduct would be otherwise inadmissible character evidence and found no basis for its admission under California Evidence Code section 1101(b).[25] Nevertheless, the court accepted Anderson's offer of proof and reviewed the police reports to determine whether the subsequent incident might be relevant to modus operandi. Exh. A-6 at 710-11. The judge determined that the evidence regarding Hunt's subsequent arrest was insufficiently similar to the beating of Romero to be relevant to modus operandi and disallowed questioning on the matter.

3. Analysis

The state court's review of the evidentiary issue was not an objectively unreasonable application of Supreme Court law. Hunt admitted to being present at the murder scene and having with him an object that fit the description that witnesses had seen the "black man" wielding. At least two other witnesses testified that Hunt hit Romero. Hence, there had already been testimony establishing the identity of the "black man" who had struck the victim. Anderson hoped to use the subsequent incident to further establish that Hunt had a propensity to hit victims with blunt objects.

Admissibility of "other acts" evidence is governed by Federal Rule of Evidence 404(b). Duran v. City of Maywood, 221 F.3d 1127, 1132 (9th Cir. 2000).[26] "Other acts" evidence is admissible under Rule 404(b) if: 1) there is sufficient proof for the jury to find that the defendant committed the other act; 2) the other act is not too remote in time; 3) the other act is introduced to prove a material issue in the case; and 4) the other act is similar to the offense charged. Id. at 1132-33. Furthermore, "[e]vidence of other crimes or acts is admissible under Rule 404(b), 'except where it tends to prove only criminal disposition.'" United States v. Ayers, 924 F.2d 1468, 1472-73 (9th Cir. 1991) (citing United States v. Sangrey, 586 F.2d 1312, 1314 (9th Cir. 1978)). California law likewise holds that "[t]he inference of a criminal disposition may not be used to establish any link in the chain of logic connecting the uncharged offense with a material fact. If no theory of relevance can be established without this pitfall, the evidence of the uncharged offense is simply inadmissible." Williams v. Superior Court, 36 Cal. 3d 441, 448 (1984). The trial court's decision to exclude the evidence was not arbitrary, but based on two separate determinations: 1) that the only theory of relevance for the subsequent bad acts relied upon proving action in conformity with a criminal disposition, and 2) that the lack of similarities between the subsequent act and the count in the immediate case precluded admission. The California Court of Appeals also considered the issue extensively, examining the grounds for the relevance of the uncharged assault and deciding that the only relevant use was impermissible under California law. Like the trial court, the California Court of Appeal determined that Anderson's theory of relevance for Hunt's subsequent act was to prove that he had acted in conformity with a criminal disposition. It found no material fact at issue to which the subsequent fight was relevant—a finding that is clearly supported by the trial record.[27] The state court did not abuse its discretion by excluding evidence of Hunt's subsequent act as irrelevant. Anderson's claim of violation of due process for improper exclusion of evidence is thus unpersuasive.[28]

CONCLUSION

Because Anderson has failed to satisfy AEDPA's standard for granting habeas relief on any of his claims, the petition is DENIED.

IT IS SO ORDERED.

Dated: April 23, 2004

/s/_____
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

## ENDNOTES

1. Anderson may also have stated an additional ground for habeas relief of "inconsistency of witness testimony." The California Superior Court did not address this issue in its original denial of the petition, but the issue is now immaterial because Anderson stipulated to drop this ground in the habeas petition before this court.

2. Although the Ninth Circuit has stated that thirty days is sufficient time for a petitioner to return to federal court following final action by the state courts, Kelly v. Small, 315 F.3d 1063, 1071 (9th Cir. 2003) (citing Zarvela v. Artuz, 254 F.3d 374, 381 (2d Cir. 2001)), in light of the Ninth Circuit's remand of this petition, the court will not find Anderson's claim unexhausted for the purpose of filing his second federal habeas petition 40 days after the final California Supreme Court ruling on his second state habeas petition.

3. The State argues that Anderson has not properly presented his constitutional claim in state court because he identified the constitutional violation with reference to a California case, People v. Wheeler, 22 Cal. 3d 258 (1979), rather than the federal case, Batson v. Kentucky, 476 U.S. 79 (1986). These cases present equivalent standards for the purposes of discriminatory use of peremptory challenges, and the court will thus construe Anderson's challenge as appropriately presented.

4. Anderson's Batson claim was last addressed in a reasoned opinion in the California Court of Appeal's opinion on direct review. Anderson's subsequent appeal to the California Supreme Court was denied without opinion. Therefore, it is the California Court of Appeal's opinion to which this court applies the section 2254 standard of review.

5. Congress amended section 2254 with the 1996 passage of AEDPA. Anderson filed the current habeas petition in September 1999, well after the effective date of AEDPA. The statute as modified by AEDPA therefore applies to this case.

6. The parties are not sure whether any African-American jurors were empaneled because the end of the voir dire is missing from the available transcripts. The surnames of the final jury members are: McCarter, Deleew, Nishimura, Crawford, MacNeal, Cardozza, Reeder, Metheny, Rocker, Haver, Laird, and Cross. One of the jurors, Nishimura, had an Asian surname, suggesting that the jury was not all-white.

7. Anderson argues that this court has an obligation to review the state court's determination of whether Anderson made out a prima facie case for racially-discriminatory use of peremptory challenges. Because the prosecution offered his reasons for striking the jurors, however, the prima facie showing issue is mooted per Hernandez.

8. These tools include the court's own evaluation of the prosecutor's credibility, a review of the record to determine whether the record undermines the prosecutor's proffered reasons, a comparison of the stuck jurors with empaneled jurors, and counsels' arguments based on the record. Lewis v. Lewis, 321 F.3d 824, 830-31 (9th Cir 2003).

9. Anderson notes that although the prosecution used three of eight peremptories to strike Hispanic and African-American jurors, taking into consideration that two of those challenges had been used against all-white panels, the prosecutor had actually used three of six challenges against minorities in those groups.

10. Wheeler is the "California analogue" to Batson v. Kentucky, 476 U.S. 79 (1986). Lewis, 321 F.3d at 827 n.5. Although the requirements for establishing a prima facie case of discrimination between Wheeler and Batson, where the prima facie case requirement is not at issue, the two cases are the same for purposes of habeas analysis under AEDPA. See Collins v. Rice, 348 F.3d 1082, 1086 n.5 (9th Cir. 2003).

11. Anderson's attorney made his Wheeler motion solely on the prosecutor's challenge to Hispanic jurors (here, Serta). Morales' attorney made a similar motion on the basis of the exclusion of "non-whites." The co-defendants joined the other's motion. Although the California Court of Appeals assumed that African-American and Hispanic jurors together constituted a cognizable group for purposes of establishing a prima facie case of racial discrimination, this court need not reach that issue because its holding is based on the second and third prongs of the Batson test.

12. Serta stated during voir dire that he had grown up in the barrios of Southern California, had never been arrested, had a nephew who had been arrested, and had a friend who was a victim of a shooting.

13. Although the second Hispanic juror was removed by the prosecution's eleventh strike, Anderson notes that the prosecution had exercised four of eight peremptory challenges to exclude African-American and Hispanic jurors when faced with a panel that included representatives from those minority groups.

14. Petitioners may argue that jurors "similarly situated' to challenged jurors permitted to remain on the jury despite the fact they "appeared to be less favorable" allows the court to infer racial bias. Wade v. Terhune, 202 F.3d 1190, 1198 (9th Cir. 2000). While true with respect to establishing a prima facie case, that Batson prong is not at issue in this case. Furthermore, Anderson has adduced no evidentiary support for this contention. Anderson's comparison of the characteristics of the challenged jurors to those empaneled does not lead to the conclusion that the state court's determination of the facts was unreasonable. The characteristics between the struck and retained jurors must be so similar as to lead to the conclusion that the race-neutral reason was a pretext for a racially discriminatory motive. Turner v. Marshall, 121 F.3d 1248, 1251-52 (9th Cir. 1997) (finding racially discriminatory motive where an African-American juror was struck for expressing disinclination to view gory photos while a white juror was retained for expressing the same disinclination more vehemently). Such strong similarities do not appear in the comparison of the relevant jurors.

15. Anderson's claim of judicial misconduct was raised in his first habeas petition to the Superior Court in Contra Costa County. The Superior Court addressed this claim in a reasoned opinion denying habeas relief. Subsequent habeas petitions raising the issue were denied without opinion. Thus the Superior Court denial of Anderson's first habeas petition is the opinion to which this court applies the section 2254 standard of review.

16. Anderson attempts to compare the relevant dialogue to that in Quercia v. United States, 289 U.S. 466 (1933), in which the judge delivered an equivalent instruction and then proceeded to pontificate to the jury on his opinion of the evidence. The statement at issue here does not approach the conduct in Quercia. It was not a "definite and concrete assertion of fact, which [she] had made with all the persuasiveness of the judicial utterance." Id. at 470-72. Rather, it was an incomplete thought made in response to an objection. With the disputed comment, the trial judge neither added to the evidence nor "put [her] own experience, with all the weight that could be attached to it, in the scale against the accused." Id. at 471. See also Maheu v. Hughes Tool Co., 569 F.2d 459, 472 (9th Cir. 1977) (judge's prejudicial comment immediately before jury retired to deliberate plus court's instruction that its oral comments be transcribed and included in booklet of instructions submitted to the jury not cured by instruction to disregard judge's comments).

17. Anderson raised both his claim of ineffective assistance of counsel and his claim that the court failed to conduct a competency hearing in his first habeas petition to the Superior Court in Contra Costa County. The Superior Court addressed this claim in a reasoned opinion denying habeas relief. Subsequent habeas petitions raising the issue were denied without opinion. Thus, the Superior Court denial in Anderson's first habeas petition is the opinion to which this court applies the section 2254 standard of review.

18. New bases for ineffective assistance of counsel claims not previously included in a state petition are unexhausted. Carriger v. Lewis, 971 F.2d 329, 333-34 (9th Cir. 1992) (en banc). Accordingly, Anderson's contentions that his attorney offended the jurors with his voir dire questioning, repeated himself

during trial, etc., will not be considered.

19. The court need not conduct a harmless error review of Strickland violations under Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), because "the Strickland prejudice analysis is complete in itself; there is no place for an additional harmless-error review." Jackson v. Calderon, 211 F.3d 1148, 1154 n.2 (9th Cir. 2000), cert. denied, 531 U.S. 1072 (2001).

20. During the sentencing phase of a capital case, by contrast, all potentially mitigating evidence is relevant, making counsel's failure to investigate potential grounds for an ineffective assistance claim. Wallace v. Stewart, 184 F.3d 1112, 1117 n.5 (9th Cir. 1999).

21. Anderson insists that the fact that he beat someone to death with a baseball bat demonstrates that he had mental problems severe enough that the judge should have sua sponte ordered a competency hearing.

22. Anderson first raised his claim that he was denied his constitutional right to a fair trial by the court's failure to sever in his direct appeal to the California Court of Appeal. This claim was not raised to the California Supreme Court on direct appeal. Only after this court found the denial of severance claim to be unexhausted did Anderson raise the issue in his second habeas petition to the California Supreme Court. That court denied the claim with a citation to In re Waltreus. Thus, the California Court of Appeal's denial on direct appeal is the opinion to which this court applies the section 2254 standard of review.

23. Juror Laird reported that he had heard Morales' attorney say "my guy" and "on medical grounds" before alerting the attorney to his presence. Morales' attorney was surprised and apologized. During voir dire by the judge, Laird assured the court that what he overheard would have no effect on his ability to be fair. Exh. A-6 at 376-78. Juror Serrano only heard the apology and likewise assured the court she could be fair. Id. at 388, 392. The judge admonished both jurors to ignore anything they might happen to remember and not to speak with the other jurors about the incident. At Anderson's counsel's request, the judge conducted a voir dire of the remaining jurors and determined that no one else had contact with any of the attorneys or discussed the incident with the two affected jurors.

24. Anderson first raised his claim that the court improperly excluded evidence regarding Thomas Hunt in his direct appeal to the California Court of Appeal, which denied the claim in a written opinion. This claim was not raised to the California Supreme Court on direct appeal. Only after this court found the evidentiary claim to be unexhausted did Anderson raise the issue in his second habeas petition to the California Supreme Court. That court denied the claim with a citation to In re Waltreus. Thus, the California Court of Appeal's denial on direct appeal is the opinion to which this court applies the section 2254 standard of review.

25. California Evidence Code section 1101 provides in relevant part:

> (a) Except as provided in this section and in section 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of his or her conduct) is admissible when offered to prove his or her conduct on a specified occasion.
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.

26. "Other acts" in Rule 404(b) includes both prior and subsequent acts. United States v. Bibo-Rodriguez, 922 F.2d 1398, 1400 (9th Cir. 1991).

27. Even had identity been an issue, a high degree of similarity is needed for an act to be relevant for modus operandi. A single subsequent incident with an unspecified weapon does not meet the substantial similarity test.

28. Anderson argues that this court must evaluate the excluded evidence under Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990), asking whether exclusion of evidence reaches constitutional proportions. Although the Tinsley factors are applicable to habeas petitions subject to AEDPA, see Chia v. Cambra, 281 F.3d 1032, 1037 (9th Cir. 2002), to implicate the Tinsley factors, the court must first find that the state evidentiary ruling was incorrect. Tinsley, 895 F.2d at 530. The court does not so find.